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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA  
10

11 UNITED STATES OF AMERICA,  
12 et al.,

NO. MISC.S-05-0018 DAD

13 Petitioners,

14 v.

ORDER

15 JOEL T. HILBERT,

16 Respondent.  
\_\_\_\_\_ /

17 This matter came before the court on November 4, 2005, for  
18 hearing on an order to show cause re civil contempt for failure to  
19 comply with this court's order enforcing two administrative summonses  
20 issued by the Internal Revenue Service ("IRS"). Kendall Newman  
21 appeared on behalf of petitioners United States of America and  
22 Revenue Officer Charles Duff. Helga White appeared on behalf of  
23 respondent Joel T. Hilbert, who previously had been proceeding pro  
24 se. After considering all written materials submitted with respect  
25 to the order to show cause, and after hearing oral argument, for the  
26 reasons discussed on the record and set forth below, the court

1 continued the hearing on the order to show cause to afford respondent  
2 a final opportunity to fully comply with court's order filed April  
3 14, 2005.

4 **PROCEDURAL BACKGROUND**

5 Petitioners initiated this action by filing a petition to  
6 enforce IRS summonses on January 18, 2005. By order filed February  
7 4, 2005, respondent was directed to show cause at hearing why those  
8 summonses should not be order enforced. At the April 8, 2005, show  
9 cause hearing, respondent, proceeding pro se, and petitioners,  
10 appearing through counsel, appeared and represented to the court that  
11 they had informally resolved this matter. Accordingly, the show  
12 cause hearing was dropped from the court's calendar and by order  
13 filed April 14, 2005. Pursuant to stipulation and order, the two IRS  
14 summonses were enforced and respondent was directed to appear before  
15 a revenue officer to give testimony and provide documents. The  
16 parties having consented to proceed before the undersigned magistrate  
17 judge, that order also reassigned this matter to the undersigned for  
18 all further proceedings pursuant to 28 U.S.C. § 636(c).

19 Following respondent's non-compliance with the April 14,  
20 2005, order, petitioners filed their verified petition re civil  
21 contempt on September 16, 2005. The undersigned issued the order to  
22 show cause re contempt on September 26, 2005. That order was filed  
23 and served on all parties the next day. Accordingly, the record  
24 indicates that respondent has been provided with notice of the  
25 contempt proceedings. Respondent does not challenge that notice and,  
26 as indicated above, he personally appeared along with his newly

1 retained counsel at the hearing on the order to show cause re  
2 contempt.

3 **LEGAL STANDARDS**

4       "[C]ourts have inherent power to enforce compliance with  
5 their lawful orders through civil contempt.'" Spallone v. United  
6 States, 493 U.S. 265, 276 (1990) (citation omitted); see also United  
7 States v. United Mine Workers of America, 330 U.S. 258, 303-304  
8 (1947); United States v. Ayres, 166 F.3d 991, 994 (9th Cir. 1999). A  
9 civil contempt sanction such as the one sought here is coercive,  
10 designed to force the contemnor to comply with an order of the court  
11 and must include a "purge" condition. Cunningham v. Hamilton County,  
12 Ohio, 527 U.S. 198, 207-08 (1999); Ayres, 166 F.3d at 997; Whittaker  
13 Corp. v. Execuair Corp., 953 F.2d 510, 517 (9th Cir. 1992). To  
14 support a judgment of contempt, the district court must find, based  
15 on clear and convincing evidence, that the party violated the order;  
16 the violation did not constitute "substantial compliance" with the  
17 order; and the violation was not based on a good faith and reasonable  
18 interpretation of the order. Ayres, 166 F.3d at 994; In re Dual-Deck  
19 Video Cassette Recorder Antitrust Litig., 10 F.3d 693, 695 (9th Cir.  
20 1993).

21       "Because civil contempt sanctions are viewed as nonpunitive  
22 and avoidable, fewer procedural protections for such sanctions have  
23 been required." Ayres, 166 F.3d at 995 (quoting International Union,  
24 United Mine Workers of America v. Bagwell, 512 U.S. 821, 831 (1994).  
25 Civil contempt "may be imposed in an ordinary civil proceeding upon  
26 notice and an opportunity to be heard. Neither a jury trial nor

1 proof beyond a reasonable doubt is required." Id. (quoting Bagwell,  
2 512 U.S. at 827). See also Thomas, Head and Greisen Employees Trust  
3 v. Buster, 95 F.3d 1449, 1458 (9th Cir. 1996) (rejecting argument that  
4 evidentiary hearing is required so that alleged contemnor may explain  
5 why court should not make contempt finding).

6 A challenge to the validity of the order the contemnor is  
7 alleged to have violated cannot excuse a failure to comply with that  
8 order. "It is a 'long-standing rule that a contempt proceeding does  
9 not open to reconsideration the legal or factual basis of the order  
10 alleged to have been disobeyed and thus become a retrial of the  
11 original controversy.'" Ayres, 166 F.3d at 995 (quoting United  
12 States v. Rylander, 460 U.S. 752, 756-57 (1983)).

### 13 **ANALYSIS**

14 The two summonses at issue in this case seek testimony and  
15 records from respondent regarding the tax liabilities of JTH  
16 Construction, Inc. for the calendar years 1998 through 2003 and JTH  
17 Framing, Inc. for the calendar years 2002 through 2003, respectively.  
18 (See Pet. to Enforce IRS Summonses, Exs. A & B.) The April 14, 2005,  
19 order of this court enforced those summonses and directed respondent  
20 to appear before a revenue officer to give testimony and produce  
21 records.

22 According to petitioners' verified petition re civil  
23 contempt, respondent appeared before a revenue officer on May 24,  
24 2005, as required by the court's order. At that time respondent  
25 sought and received a continuance to produce records and re-appeared  
26 on June 15, 2005, at which time he fully complied with the summons

1 regarding JTH Construction, Inc. However, respondent sought and  
2 received another continuance from petitioners for compliance with  
3 respect to the summons seeking JTH Framing, Inc. records. Pursuant  
4 to this agreement with petitioners, respondent re-appeared on July  
5 19, 2005, but did not produce the required records, blaming unforeseen  
6 family events in this regard. Accordingly, petitioners and  
7 respondent arranged yet another continuance to August 25, 2005, for  
8 the production of the JTH Framing, Inc. documents. However,  
9 respondent did not appear on August 25, 2005, leaving petitioners a  
10 voice mail message on the morning of August 25 reporting that a  
11 family emergency had arisen. According to petitioners' verified  
12 petition re civil contempt, respondent has yet to comply with the  
13 court's order as to the JTH Framing, Inc. documents.

14 In addition to their verified petition re civil contempt,  
15 petitioners have submitted correspondence between petitioners and  
16 respondent regarding the various continuances agreed to by the  
17 parties. Those documents support petitioners' version of events,  
18 which stands undisputed. Further, while respondent managed to appear  
19 at the civil contempt proceeding before the court, he failed to file  
20 a written response to the order to show cause re contempt as  
21 required. (See Order to Show Cause filed September 27, 2005.) There  
22 also is no evidence of "substantial compliance" with the court's  
23 order, In re Dual-Deck Video Cassette Recorder Antitrust Litig., 10  
24 F.3d at 695; "a present inability to comply," Ayres, 166 F.3d at 994;  
25 or any other defense against a finding of contempt, and respondent  
26 asserts no such defense. Accordingly, the court finds that clear and

1 convincing evidence demonstrates that respondent has violated the  
2 court's April 14, 2005, order.

3           Nonetheless, in light of respondent's personal and  
4 financial difficulties discussed at the hearing, and considering that  
5 respondent is now represented by counsel, the court will afford  
6 respondent one final opportunity to file the delinquent returns at  
7 issue in this case and complete the required production of documents  
8 as directed by this court's order filed April 14, 2005. If  
9 respondent has not fully complied with the April 14, 2005, order by  
10 the time the continued hearing on this matter commences, it is the  
11 court's intention to issue a finding of civil contempt at that time  
12 and incarcerate respondent as a coercive sanction until full  
13 compliance with the court's order is achieved.

14           "[I]n determining how large a coercive sanction should be  
15 the court should consider the 'character and magnitude of the harm  
16 threatened by continued contumacy, and the probable effectiveness of  
17 any suggested sanction.'" General Signal Corp. v. Donallco, Inc.,  
18 787 F.2d 1376, 1380 (9th Cir. 1986) (quoting United Mine Workers, 330  
19 U.S. at 304). In this regard, the court recognizes that respondent's  
20 failure to comply with the court's order allegedly is due to  
21 unforeseen family circumstances, including at least one "emergency."  
22 Also, until now respondent has been proceeding pro se and he has not  
23 flouted the court's order completely. In this regard, he has  
24 physically appeared before the revenue officer on more than one  
25 occasion and it is undisputed that he has complied with one of the  
26 two summonses at issue. Nonetheless, respondent still has failed to

1 comply with an order of this court that was issued more than six  
2 months ago and has made inconsistent representations to petitioners  
3 and the court with respect to his compliance efforts. Respondent  
4 also failed to respond in writing to the court's order to show cause  
5 re contempt as required. Accordingly, the court finds that  
6 incarcerating respondent, in the event he has not fully complied with  
7 the court's order by the time of the continued hearing, is  
8 appropriate and likely to effectuate compliance with the court's  
9 order. See S.E.C. v. Elmas Trading Corp., 824 F.2d 732 (9th Cir.  
10 1987) (holding district court did not abuse its discretion in  
11 adjudging party in civil contempt and ordering him incarcerated until  
12 required documents produced). The court has considered the  
13 imposition of monetary sanctions against respondent for each day he  
14 continues to fail to comply with the April 14, 2005, order. However,  
15 in the court's judgment such a coercive sanction is not likely to  
16 effectuate compliance with the court's order due to respondent's  
17 already difficult financial situation.

#### 18 CONCLUSION

19 Accordingly, for the reasons set forth above IT IS HEREBY  
20 ORDERED<sup>1</sup> that:

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22 <sup>1</sup> The parties having consented to proceed before the undersigned  
23 magistrate judge pursuant to 28 U.S.C. § 636(c), it is not necessary  
24 -- as suggested by petitioners in their petition re civil contempt --  
25 to certify facts to the assigned district judge so that he may  
26 conduct an evidentiary hearing as to why respondent should not be  
held in contempt. See 28 U.S.C. § 636(e)(4) ("In any case in which a  
United States magistrate judge presides with the consent of the  
parties under subsection (c) of this section ... the magistrate judge  
may exercise the civil contempt authority of the district court.").

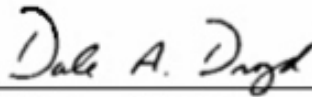
1           1. The hearing on the order to show cause re civil  
2 contempt is continued to **November 29, 2005**, at **10:00 a.m.** in  
3 Courtroom no. 27 before the undersigned;

4           2. Respondent will be afforded one final opportunity to  
5 comply with this court's order filed April 14, 2005. If respondent  
6 has not fully complied with that order by the time the continued  
7 hearing on this matter commences, it is the court's intention to  
8 issue a finding of civil contempt at that time and incarcerate  
9 respondent until such full compliance occurs;

10           3. Respondent is directed to personally appear at the  
11 November 29, 2005, hearing; and

12           4. Respondent is further directed to supply a copy of this  
13 order to attorney Helga White who is directed to sign and file a  
14 confirmation of her appearance as respondent's attorney of record  
15 within three (3) court days of the initial hearing on the order to  
16 show cause.

17 DATED: November 7, 2005.

18 

19 DALE A. DROZD  
20 UNITED STATES MAGISTRATE JUDGE

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